Supreme Court, U.S.
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No. 14-1146

In the
Supreme Court of the United States

TYSON FOODS, INC.,
PETITIONER,
v.
PEG BOUAPHAKEO, ET AL.,
RESPONDENTS.

On Writ of Certiorari
to the United States Court of Appeals
for the Eighth Circuit

BRIEF OF ILLINOIS, CONNECTICUT, MARYLAND, MASSACHUSETTS, NEW YORK, OREGON, PENNSYLVANIA, AND WASHINGTON AS AMICI CURIAE IN SUPPORT OF RESPONDENTS

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QUESTIONS PRESENTED

1. Whether, in this class and collective action for wage-and-hour violations arising out of an employer's failure properly to compensate employees for time spent donning and doffing protective equipment and walking between sites where work was performed, the district court abused its discretion in granting certification where plaintiffs proceeded to prove the amount of work they did using individual timesheet evidence and representative proof concerning donning, doffing, and walking times in accordance with *Anderson v. Mt. Clemens Pottery Co.*, 328 U.S. 680 (1946).

2. Whether a class or collective action may be certified when it contains members who may not have been injured.

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Alvarez v. IBP, Inc., 339 F.3d 894 (9th Cir. 2003), *aff'd*, 546 U.S. 21 (2005). ..	12
Anderson v. Mt. Clemens Pottery Co., 328 U.S. 680 (1946), *superseded by statute on other grounds*, Portal–to–Portal Act of 1947, Pub.L. No. 80–49, 61 Stat. 84..	*passim*
Anderson v. State, Dep't of Soc. & Health Servs., 63 P.3d 134 (Wash. Ct. App. 2003)..	13
Arlington v. Miller's Trucking, Inc., 343 P.3d 1222 (Mont. 2015).	30
Barios v. Brooks Range Supply, Inc., 26 P.3d 1082 (Alaska 2001)..	30
Bigelow v. RKO Radio Pictures, 327 U.S. 251 (1946)..	34
Boucher v. U.S. Suzuki Motor Corp., 73 F.3d 18 (2d Cir. 1996).. .	35
Braun v. Wal-Mart Stores, Inc., 106 A.3d 656 (Pa. 2014).	30

TABLE OF AUTHORITIES—Continued

Brick Masons Pension Trust v. Indus. Fence & Supply, 839 F.2d 1333 (9th Cir. 1988).. 34

Cantrell v. Delta Airlines, Inc., 2 F. Supp. 2d 1460 (N.D. Ga. 1998). 37

Combs v. King, 764 F.2d 818 (11th Cir. 1985). 34

Cooper v. Creative Homes of Distinction, LLC, 568 S.E. 2d 337 (N.C. Ct. App. Sept. 3, 2002). 30

Exxon Corp. v. Texas Motor Exchange, Inc., 628 F.2d 500 (5th Cir.1980). 35

Foremost Dairies, Inc. v. Ivey, 204 F.2d 186 (5th Cir. 1953).. 28

Garcia v. Tyson Foods, 770 F.3d 1300 (10th Cir. 2014).. 11, 12

G.M. Brod & Co., Inc. v. U.S. Home Corp., 759 F.2d 1526 (11th Cir.1985). 35

Handford v. Buy Rite Office Prods., Inc., 3 N.E.3d 1245 (Ohio Ct. App. 2013).. 30

Hart v. RCI Hospitality Holdings, Inc., 2015 WL 1061501 (S.D.N.Y. Mar. 11, 2015). 29

Hernandez v. Mendoza, 245 Cal. Rptr. 36 (Cal. Ct. App. 1988). 30

TABLE OF AUTHORITIES—Continued

Hodgson v. Elm Hill Meats of Ky., Inc.,
463 F.2d 1186 (6th Cir. 1972).. 28

Hoffmann-La Roche Inc. v. Sperling,
493 U.S. 165 (1989). 23

In re United Parcel Serv. Wage & Hour Cases,
190 Cal. App. 4th 1001 (2d Div. 2010).. 13

In re Polyurethane Foam Antitrust Litig.,
2014 WL 6461355 (N.D.Ohio Nov. 17, 2014). 33

Johnson & Jenkins Funeral Home, Inc. v. District of Columbia, 318 A.2d 596
(D.C. 1974). 30

Lewis v. Giordano's Enters., Inc.,
921 N.E. 2d 740 (Ill. App. Ct. 2009).. 12

Martin v. Selker Bros., Inc.,
949 F.2d 1286 (3rd Cir. 1991).... .. 28

Martin v. Tony & Susan Alamo Found.,
952 F.2d 1050 (8th Cir.1992). .. 28

McLaughlin v. Ho Fat Seto,
850 F.2d 586 (9th Cir. 1988).. .. 28, 29

Metzler v. IBP, Inc.,
127 F. 3d 959 (10th Cir. 1997). 2

Mid Hudson Pam Corp. v. Hartnett,
549 N.Y.S.2d 835 (N.Y. App. Div. 1989). 30, 31

TABLE OF AUTHORITIES—Continued

Morehead v. People ex rel. Tipaldo,
298 U.S. 587 (1936).. 5

Morgan v. Family Dollar Stores,
551 F.3d 1233 (11th Cir. 2008).. 28

New Jersey Dept. of Labor v. Pepsi-Cola,
2002 WL 187400(N.J. Super. Ct. App. Div.
Jan. 31, 2002)... .. 30, 31

People ex rel. Illinois Dep't of Labor v. 2000 W. Madison Liquor Corp., 917 N.E.2d 551
(Ill. App. Ct. 2009).. .. 30

Perez v. Mountaire Farms,
610 F. Supp. 2d 499 (D. Md. 2009),
aff'd in relevant part, 650 F.3d 350
(4th Cir. 2011). 29

Porter v. Poindexter,
158 F.2d 759 (10th Cir. 1947).. 28

Pugh v. Evergreen Hosp. Med. Ctr.,
312 P.3d 665 (Wash. Ct. App. 2013).. 31

Quinn v. Alaska State Employees Ass'n. Fed'n of State, Cnty. & Mun. Employees, Local 52, 944
P.2d 468 (Alaska 1997). .. 13

Reich v. Gateway Press, Inc.,
13 F.3d 685 (3d Cir.1994). 28

TABLE OF AUTHORITIES—Continued

Reich v. S. New England Telecomm. Corp.,
121 F.3d 58 (2d Cir. 1997).. 28

Schoonmaker v. Larence Brunoli, Inc.,
828 A.2d 64 (Conn. 2003). 30

Sec'y of Labor v. DeSisto,
929 F.2d 789 (1st Cir. 1991). 28

Sensonics, Inc. v. Aerosonic Corp.,
81 F.3d 1566 (Fed. Cir. 1996).. .. 34

Sheldon v. Metro-Goldwyn Pictures Corp.,
309 U.S. 390 (1940)... .. 34

Stanbrough v. Vitek Solutions, Inc.,
445 S.W.3d 90 (Miss. Ct. App. 2014). .. 30

State of New Mexico ex. rel. State Labor Comm'r v. Goodwill Indus., 478 P.2d 543 (N.M. 1970). 30

Story Parchment Co. v. Paterson Parchment Co.,
282 U.S. 555 (1931). 33

Stryker Corp. v. Intermedics Orthopedics, Inc.,
891 F. Supp. 751 (E.D.N.Y. 1995),
aff'd, 96 F.3d 1409 (Fed. Cir. 1996). 35

U.S. Dep't of Labor v. Cole Enters., Inc.,
62 F.3d 775 (6th Cir. 1995).. 28

Veverka v. New York State Dept. of Labor,
404 N.Y.S.2d 276 (N.Y. Sup. Ct. 1978).. .. 36

TABLE OF AUTHORITIES—Continued

Wal-Mart Stores, Inc. v. Dukes,
_U.S._, 131 S. Ct. 2541 (2011). 23

W. Coast Hotel Co. v. Parrish,
300 U.S. 379 (1937). .. 5, 6

Wirtz v. McClure, 333 F.2d 45 (10th Cir. 1964). 28

Statutes and Regulations:

29 U.S.C. §§ 201 *et seq*... .. 1

29 U.S.C. § 202. .. 7

29 U.S.C. § 204. 7

29 U.S.C. § 206. 7

29 U.S.C. § 207. .. 7

29 U.S.C. § 211. 7

29 U.S.C. § 216. .. 7

29 U.S.C. § 218. 8

29 U.S.C. § 1059(a)(1). .. 37

29 C.F.R. § 516.2(a)(7). 7

29 C.F.R. § 516.6(a)(1). .. 7

29 C.F.R. § 825.110(c). 37

TABLE OF AUTHORITIES—Continued

39 F.R.D. 69. 7

Alaska Stat. § 23.10.060.. 9

Alaska Stat. § 23.10.100.. 8

Alaska Stat. § 23.10.110(a). 11

Alaska Stat. § 23.10.350.. 9

Alaska Stat. § 23.20.350.. .. 36

Ariz. Rev. Stat. Ann. § 23-364. 8, 11

Ark. Code Ann. § 11-4-217.. 8

Ark. Code Ann. § 11-4-218... 11

Cal. Lab. Code § 510.. 9

Cal. Lab. Code § 512.. 9

Cal. Lab. Code § 1174.. 8

Cal. Lab. Code § 1197.5. 11

Colo. Rev. Stat. § 8-6-118.. 11

CO Wage Order 30, 7 C.C.R. 1103-1. 9

CO Wage Order 31, 7 C.C.R. 1103-1. 8, 9

Conn. Gen. Stat. § 31-51ii. .. 9

TABLE OF AUTHORITIES—Continued

Conn. Gen. Stat. § 31-51kk 37

Conn. Gen. Stat. § 31-66. 8

Conn. Gen. Stat. § 31-68. 11

Del. Code Ann. tit. 19 § 707 .. 9

Del. Code Ann. tit. 19, § 907. 8

Del. Code Ann. tit. 19, § 911. 11

Fla. Stat. § 443.111.. .. 36

Fla. Stat. § 448.110(6)(a) 11

Fla. Stat. § 450.081(4). .. 9

Ga. Code Ann. § 34-4-3(c). 10

Ga. Code Ann. § 34-4-5.. 8

Ga. Code Ann. § 34-4-6.. 11

Haw. Rev. Stat. § 387-6. 8

Haw. Rev. Stat. § 387-12(b).. .. 11

Idaho Code Ann. § 44-1508. .. 11

Idaho Code Ann. § 45-610. .. 8

820 Ill. Comp. Stat. 105/8 . .. 8

TABLE OF AUTHORITIES—Continued

820 Ill. Comp. Stat. 105/12.. 11

820 Ill. Comp. Stat. 140/3.. . . 9

820 Ill. Comp. Stat. 305/10.. 37

Ind. Code Ann. § 22-2-2-9. 11

Iowa Code § 91A.6. 8

Iowa Code 92.7. 9

Kan. Stat. Ann. § 44-1203(c). . . 9

Kan. Stat. Ann. § 44-1209. 8

Kan. Stat. Ann. § 44-1211. 11

Ky. Rev. Stat. Ann. § 337.320. 8

Ky. Rev. Stat. Ann. § 337.385. . . 11

La. Rev. Stat. Ann. 23:1600. 37

La. Rev. Stat. Ann. 23:1660. . 8

Me. Rev. Stat. tit. 26, § 622. 8

Me. Rev. Stat. tit. 26, § 670. . . 11

Md. Code Ann., Lab. & Empl. § 3-210 . . . 9

Md. Code Ann., Lab. & Empl. § 3-424.. 8

TABLE OF AUTHORITIES—Continued

Md. Code Ann., Lab. & Empl. § 3-426(a)(1). 11

Mass. Gen. Laws Ch. 149, § 100. 9

Mass. Gen. Laws ch. 151, § 15 8

Mass. Gen. Laws ch. 151, § 20. . 11

Mich. Comp. Laws § 408.419(1)(a). . . 11

Mich. Comp. Laws § 408.420 . . 10

Mich. Comp. Laws § 408.479 . . 8

Mich. Comp. Laws § 409.112 9

Mich. Comp. Laws § 421.27 36

Minn. Stat. § 177.253. 9

Minn. Stat. § 177.254. . 9

Minn. Stat. § 177.30 . 8

Miss. Code. Ann. § 25-3-93 . . 37

Mo. Rev. Stat. § 290.505(4) .. 13

Mo. Rev. Stat. § 290.520.. . . 8

Mo. Rev. Stat. § 290.527.. . . 11

Mont. Code Ann. § 39-3-407 11

TABLE OF AUTHORITIES—Continued

Mont. Admin. R. 24.16.6102 8

Neb. Rev. Stat. § 48-1231. 11

Nev. Rev. Stat. § 608.018. 9

Nev. Rev. Stat. § 608.019. 9

Nev. Rev. Stat. § 608.115. 8

Nev. Rev. Stat. § 608.260. 11

N.H. Rev. Stat. Ann. § 279:27. 8

N.H. Rev. Stat. Ann. § 279:29. 11

N.J. Admin. Code § 12:56-4.1. 8

N.J. Stat. Ann. § 34:11-56a25. 11

N.M. Stat. Ann. § 50-4-9 8

N.M. Stat. Ann. § 50-4-26. 11

N.Y. Lab. Law § 162. 9

N.Y. Lab. Law § 195. 8

N.Y. Lab. Law § 663. 11

N.C. Gen. Stat. § 95-25.15. 8

N.C. Gen. Stat. § 95-25.22. 11

TABLE OF AUTHORITIES—Continued

N.C. Gen. Stat. § 97-29 .. 37

N.D. Cent. Code § 34-14-09. 11

Ohio Rev. Code Ann. § 4111.14. 8, 11

40 Okla. Stat. Ann. § 197.4. .. .. .. 9, 11

Okla. Admin. Code 380:30-3-3 .. 8

Or. Rev. Stat. § 653.045. 8

Or. Rev. Stat. § 653.055. .. 11

Or. Rev. Stat. § 653.261. .. 9

43 Pa. Stat. Ann. § 333.113. 11

77 Pa. Cons. Stat. § 582 .. 37

34 Pa. Code § 231.31.. 8

R.I. Gen. Laws § 28-12-12. .. 8

R.I. Gen. Laws § 28-12-19. 11

R.I. Gen. Laws § 28-48-2 37

S.C. Code Ann. § 41-10-30. 8

Tenn. Code Ann. § 50-2-103 (h).. 9

Tex. Gov't Code Ann. § 661.912 37

TABLE OF AUTHORITIES—Continued

Tex. Lab. Code § 62.051 13

Tex. Lab. Code § 62.151. . . . 9

Tex. Lab. Code § 62.203. . 11

Utah Code Ann. § 34-28-10. 8

Utah Code Ann. § 34-40-205. 11

Vt. Stat. Ann. tit. 21, § 393. 8

Vt. Stat. Ann. tit. 21, § 395. . . 11

Va. Code Ann. § 40.1-28.9(B)(12). 9

Va. Code Ann. § 40.1-28.12. 11

16 Va. Admin. Code 5-32-10.. 8

Wash. Rev. Code § 49.46.070. . . 8

Wash. Rev. Code § 49.46.090. . . 11

Wash. Rev. Code. § 51.08.178 37

W. Va. Code § 21-5C-5. . . 8

W. Va. Code § 21-5C-7. 11

Wis. Stat. Ann. § 104.09.. 8

Wyo. Stat. Ann. § 27-4-203. 9

TABLE OF AUTHORITIES—Continued

Wyo. Stat. Ann. § 27-4-204(a). 11

D.C. Code § 32-1008. 9

D.C. Code § 32-1012. . . 11

Other Authorities:

Craig Becker, Paul Strauss, *Representing Low-Wage Workers in the Absence of A Class: The Peculiar Case of Section 16 of the Fair Labor Standards Act and the Underenforcement of Minimum Labor Standards*, 92 MINN. L. REV. 1317 (2008). 18

ANNETTE BERNHARDT, ET. AL., BROKEN LAWS, UNPROTECTED WORKERS: VIOLATIONS OF EMPLOYMENT AND LABOR LAWS IN AMERICA'S CITIES (2009). 14, 15, 24

ANNETTE BERNHARDT & SIOBHÁN MCGRATH, BRENNAN CTR. FOR JUST., ECONOMIC POLICY BRIEF NO. 4, TRENDS IN WAGE AND HOUR ENFORCEMENT BY THE U.S. DEPARTMENT OF LABOR 1975-2004 (2005). . . 20

KIM BOBO, WAGE THEFT IN AMERICA (2009).. 14

Andrew C. Brunsden, Hybrid Class Action, *Dual Certification, and Wage Law Enforcement in the Federal Courts*, 29 BERKELEY J. EMP. & LAB. L. 2 (2008). 19

TABLE OF AUTHORITIES—Continued

DONALD S. CHISUM, CHISUM ON PATENTS. . . 34

Llezlie Green Coleman, *Procedural Hurdles and Thwarted Efficiency: Immigration Relief in Wage and Hour Collective Actions*, 16 HARV. LATINO L. REV. 1 (2013). 23

DAVID COOPER AND DOUGLASS HALL, ECONOMIC POLICY INSTITUTE, RAISING THE FEDERAL MINIMUM WAGE TO $10.10 WOULD GIVE WORKING FAMILIES, AND THE OVERALL ECONOMY, A MUCH-NEEDED BOOST (March 13, 2013), www.epi.org/files/2013/IB354-Minimum-wage.pdf. . . 17

Frank T. DeVyer, *Regulation of Wages and Hours Prior to 1938*, 6 L. & CONTEMP. PROBS. 323 (1939).. . . 5

Matthew W. Finkin, *From Weight Checking to Wage Checking: Arming Workers to Combat Wage Theft*, 90 IND. L.J. 851 (2015).. . . . 14, 24

John S. Forsythe, *Legislative History of the Fair Labor Standards Act*, 6 L & CONTEMP. PROBS. 464 (1939). . . 7

J. Maria Glover, *The Structural Role of Private Enforcement Mechanisms in Public Law*, 53 WM. & MARY L. REV. 1137 (2012). 19, 22

TABLE OF AUTHORITIES—Continued

Bruce Goldstein, Marc Linder, Laurence E. Norton, II, and Catherine K. Ruckelshaus, *Enforcing Fair Labor Standards in the Modern American Sweatshop: Rediscovering the Statutory Definition of Employment*, 46 UCLA L. REV. 983 (1999).. 6

STEVEN GREENHOUSE, THE BIG SQUEEZE (2008). 14

Jonathan Grossman, *Maximum Struggle for a Minimum Wage*, www.dol.gov/dol/aboutdol/history/flsa1938.htm. 6, 7

KEN JACOBS, IAN PERRY, & JENNIFER MACGILLVARY, UC BERKELEY CENTER FOR LABOR RESEARCH AND EDUCATION, THE HIGH PUBLIC COST OF LOW WAGES (April 2015), laborcenter.berkeley.edu/pdf/2015/the-high-public-cost-of-low-wages.pdf. 17

MICHAEL KATZ, IN THE SHADOW OF THE POORHOUSE: A SOCIAL HISTORY OF WELFARE IN AMERICA (1986).. 6

Irene Lurie, *Enforcement of State Minimum Wage and Overtime Laws: Resources, Procedures, and Outcomes*, 15 EMP. RTS. & EMP. POL'Y J. 411 (2011).. . . 22

TABLE OF AUTHORITIES—Continued

DENISE MARTIN, STEPHANIE PLANCICH, & JANEEN MCINTOSH, NERA ECONOMIC CONSULTING, TRENDS IN WAGE AND HOUR SETTLEMENTS: 2012 UPDATE (2013), www.nera.com/content/dam/nera/publications/archive2/PUB_Wage_and_Hour_Settlements_0313.pdf.. 16

BRADY MEIXAL AND ROSS EISENBRY, ECONOMIC POLICY INSTITUTE, AN EPIDEMIC OF WAGE THEFT IS COSTING WORKERS HUNDREDS OF MILLIONS OF DOLLARS A YEAR 2, (September 2014),www.epi.org/publication/epidemic-wage-theft-costing-workers-hundreds/. .. 16

JACOB S. MEYER & ROBERT GREENLEAF, NAT'L ST. ATT'Y GEN. PROGRAM, COLUMB. L. SCH., ENFORCEMENT OF STATE WAGE AND HOUR LAWS, A SURVEY OF STATE REGULATORS (April 2011), web.law.columbia.edu/attorneys-general/policy-areas/labor-project/resources/state-and-hour-laws.. .. .. 10, 11, 21, 22

RUTH MILKMAN, ANNA LUZ GONZALEZ, & VICTOR NARRO, INSTITUTE FOR RESEARCH ON LABOR AND EMPLOYMENT, UNIVERSITY OF CALIFORNIA, LOS ANGELES, WAGE THEFT AND WORKPLACE VIOLATIONS IN LOS ANGELES: THE FAILURE OF EMPLOYMENT AND LABOR LAW FOR LOW-WAGE WORKERS 53 (2010). .. 16

TABLE OF AUTHORITIES—Continued

MINIMUM WAGE LAWS IN THE STATES, UNITED STATES DEPARTMENT OF LABOR, www.dol.gov/whd/minwage/america.htm.. 9

PLANMATICS, INC., INDEPENDENT CONTRACTORS: PREVALENCE AND IMPLICATIONS FOR UNEMPLOYMENT INSURANCE PROGRAMS (February 2000), wdr.doleta.gov/owsdrr/00-5/00-5.pdf. 38

REPORT OF THE TREASURY INSPECTOR GENERAL FOR TAX ADMINISTRATION, WHILE ACTIONS HAVE BEEN TAKEN TO ADDRESS WORKER MISCLASSIFICATION, AN AGENCY-WIDE EMPLOYMENT TAX PROGRAM AND BETTER DATA ARE NEEDED (February 2009), www.treasury.gov/tigta/auditreports/2009reports/200930035fr.html.. 38

Peter Romer-Friedman, *Eliot Spitzer Meets Mother Jones: How State Attorneys General Can Enforce State Wage and Hour Laws*, 39 COLUM. J.L. & SOC. PROBS. 495 (2006).. 10

Nantiya Ruan, *Facilitating Wage Theft: How Courts Use Procedural Rules to Undermine Substantive Rights of Low-Wage Workers*, 63 VAND. L. REV. 727 (2010). 24

TABLE OF AUTHORITIES—Continued

Nantiya Ruan, *What's Left to Remedy Wage Theft? How Arbitration Mandates that Bar Class Actions Impact Low Wage Workers*, 2012 MICH. ST. L. REV. 1103 (2012). 22, 24

Nantiya Ruan & Nancy Reichman, *Hours Equity Is the New Pay Equity*, 59 VILL. L. REV. 35 (2014).. .. 25

Catherine K. Ruckelshaus, *Labor's Wage War*, 35 FORDHAM URB. L.J. 373 (2008). 14

Kirk J. Stark, City Welfare: Views from Theory, History, and Practice, 27 URB. LAW. 495 (1995).. 6

Matthew C. Stephenson, *Public Regulation of Private Enforcement: The Case for Expanding the Role of Administrative Agencies*, 91 VA. L. REV. 93 (2005). 22

U.S. Dep't of Labor, Wage and Hour Division Enforcement Statistics, www.dol.gov/whd/statistics/statstables.htm. .. 15, 21

TABLE OF AUTHORITIES—Continued

UNITED STATES GOVERNMENT ACCOUNTABILITY OFFICE, FAIR LABOR STANDARDS ACT: DEPARTMENT OF LABOR NEEDS A MORE SYSTEMATIC APPROACH TO DEVELOPING ITS GUIDANCE, TESTIMONY BEFORE THE SUBCOMMITTEE ON WORKFORCE PROTECTIONS July 23, 2014), gao.gov/assets/670/664949.pdf. 18

DAVID WEIL, IMPROVING WORKPLACE CONDITIONS THROUGH STRATEGIC ENFORCEMENT (2010). 14

David Weil and Amanda Pyles, *Why Complain? Complaints, Compliance, and the Problem of Enforcement in the U.S. Workplace*, 27 COMP. LAB. L. & POL'Y J. 59 (2005). 15, 16, 20, 21

INTEREST OF THE AMICI

The Amici States have a vital interest in this case, which could negatively affect their ability to ensure effective and robust wage-and-hour law enforcement for their residents. The States' wage-and-hour regulation is part of a dual, public-private enforcement scheme, in which both government agencies and private litigants bring wage claims on behalf of unpaid and underpaid workers. Petitioner, however, would weaken this well-established enforcement scheme by limiting workers' ability to bring collective and class actions to recover unpaid wages under the Fair Labor Standards Act (FLSA), 29 U.S.C. §§ 201 *et seq.*, and comparable state laws in situations where employers have failed to keep accurate records of the hours worked by their employees.

More specifically, Petitioner seeks to significantly limit this Court's decision in *Anderson v. Mt. Clemens Pottery Company*, 328 U.S. 680 (1946), *superseded by statute on other grounds*, Portal–to–Portal Act of 1947, Pub.L. No. 80–49, 61 Stat. 84, and the seven decades of state and federal case law relying on it. *Mt. Clemens* addressed the appropriate burdens of proof when an employer has not kept the statutorily required records of the hours its employees have worked. Rather than requiring that each employee produce evidence establishing precisely the number of hours worked, which the employer's own failure to keep records has made impossible, this Court established a burden-

shifting test which permits an employee to rely on representative proof, *Mt. Clemens*, 328 U.S. at 687-88, such as testimony of individual employees or expert time studies, to prove liability and damages for unpaid wages.

This case involves the relevance of *Mt. Clemens* to class or collective actions to recover unpaid wages. Petitioner's position is that because individual employees may well have worked different amounts of time, there is a lack of "predominance," as required by Rule 23, and so a class or collective action cannot be brought. Pet. Br. at 29-32. More specifically, Petitioner suggests that the burden-shifting framework of *Mt. Clemens* cannot be relied on to provide the common evidence necessary to establish predominance. *Id.* at 40-44. Petitioner's view would significantly weaken effective enforcement not only of the federal FLSA, but also of state wage-and-hour laws, which are often enforced as companion claims in FLSA lawsuits—and it could have implications far beyond this area of law.

Limiting class and collective actions as Petitioner suggests would affect the Amici States in three principal ways. First, limiting class and collective actions would weaken private wage law enforcement which, in turn, would place significant additional burdens on already under-resourced government enforcement agencies—which were never intended to bear the weight of enforcing these laws alone. Second, limitations on private enforcement of the FLSA and of state wage laws

in federal court would remove the backdrop of robust private enforcement of the FLSA against which States' laws, procedures, and administrative entities, have developed, disrupting settled expectations about how state law and federal law interact in this area. Finally, Petitioner's view would create incentives for employers not to keep statutorily required records, which would in turn hamper the enforcement of not only wage-and-hour laws, but also a variety of other laws.

For these reasons, the Amici States respectfully submit this brief in support of Respondents.

SUMMARY OF ARGUMENT

Circumscribing the applicability of the long-established *Mt. Clemens* burden-shifting framework as Petitioner urges will weaken the carefully crafted enforcement scheme for federal and state wage-and-hour laws. Both the federal FLSA and numerous state wage-and-hour laws rely on the public-private enforcement scheme by which essential employee protections are safeguarded through vigilant enforcement by government agencies as well as private parties. But if employees are not able to use representative evidence to establish the necessary conditions for class or collective actions in federal court, the efficacy of private enforcement will be damaged, and government agencies are not equipped to adequately enforce these important protections by themselves. And not only would many wage-and-hour protections, which remain vital more than seventy-five years after the

FLSA's passage, be inadequately enforced, but employers would be rewarded for violating other statutory provisions requiring that they keep complete and accurate records. This Court long ago adopted the *Mt. Clemens* framework, which addresses situations where employers do not keep adequate records, to enable meaningful enforcement of wage-and-hour standards. Petitioner's effort to undermine decades of well-reasoned reliance on *Mt. Clemens* should be rejected.

ARGUMENT

I. State Wage Laws Build on the FLSA, and Both Rely on a Public-Private Enforcement Scheme in Which Class and Collective Actions are Critical.

State wage-and-hour laws predate the FLSA, and since the FLSA's enactment, also build upon it. As wage-and-hour violations continue to be prevalent and negatively affect States' budgets and economic conditions, effective enforcement is critical. Both federal and state wage-and-hour laws rely heavily on private lawsuits as part of their enforcement regime, and class and collective actions are central to the availability and effectiveness of such private lawsuits.

A. Federal and State Wage Laws Are Intertwined.

States have regulated wages paid and hours worked for more than a century. Massachusetts passed the first minimum wage law in 1912, and by 1923 an additional 14 States followed suit, passing legislation that set a minimum hourly wage or maximum number of work hours (or both).[1] *See* Frank T. DeVyer, *Regulation of Wages and Hours Prior to 1938*, 6 L. & CONTEMP. PROBS. 323, 327 (1939). By 1937, 25 States had enacted laws establishing some kind of minimum wage. *Id.* at 329.

In passing these laws, States were responding to significant developments in the economy and labor market. As increased industrialization took hold, child labor, sweatshop conditions, and inadequate wages were

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[1] Several of these early wage laws were struck down by this Court on the grounds that state legislatures could not constitutionally interfere with private contracts between employers and employees. *See, e.g., Adkins v. Children's Hosp.*, 261 U.S. 525 (1923) (invalidating the District of Columbia's minimum wage law); *Morehead v. People ex rel. Tipaldo*, 298 U.S. 587, 609 (1936) (striking a New York State minimum wage law). In 1937, however, the Court revisited these decisions and upheld a Washington law that established a minimum wage for women and children. *See W. Coast Hotel Co. v. Parrish*, 300 U.S. 379 (1937). That States continued to enact such laws even when their constitutionality was regularly challenged is a measure of those laws' importance to the States.

commonplace.[2] This, in turn, led to a segment of the population that, although employed, nonetheless lived in poverty and often depended upon public assistance to meet the requirements of daily living.[3] Indeed, this Court took judicial notice of the "unparalleled demands for relief" that arose during the Great Depression, expressed concern that "what these workers lose in wages the taxpayers are called upon to pay," and concluded that "[t]he community is not bound to provide what is in effect a subsidy for unconscionable employers." *W. Coast Hotel*, 300 U.S. at 399.

Congress responded as well, passing the FLSA in 1938 to remedy conditions "detrimental to the maintenance of the minimum standard of living necessary for health, efficiency, and general well-being

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[2] Bruce Goldstein, Marc Linder, Laurence E. Norton, II, and Catherine K. Ruckelshaus, *Enforcing Fair Labor Standards in the Modern American Sweatshop: Rediscovering the Statutory Definition of Employment*, 46 UCLA L. REV. 983, 1055-1061 (1999); *see also* Jonathan Grossman, *Maximum Struggle for a Minimum Wage*, (providing comprehensive history of events and social conditions leading to passage of FLSA) *available at* www.dol.gov/dol/aboutdol/history/flsa1938.htm (last visited September 28, 2015).

[3] "From the period 1912 to 1920, large city welfare outlays increased 79 percent, and most cities began actively reorganizing local welfare departments." Kirk J. Stark, City Welfare: Views from Theory, History, and Practice, 27 URB. LAW. 495, 515 (1995) (citing MICHAEL KATZ, IN THE SHADOW OF THE POORHOUSE: A SOCIAL HISTORY OF WELFARE IN AMERICA 154-56 (1986)).

of workers." 29 U.S.C. § 202.[4] The FLSA establishes a minimum hourly wage and mandates payment of overtime to covered employees, among other things. 29 U.S.C. §§ 206, 207. It also requires employers to keep records of the hours their employees work. *Id.* § 211(c); *see also* 29 C.F.R. §§ 516.2(a)(7), 516.6(a)(1).

The FLSA relies on both governmental and private enforcement. Section 204 establishes the Wage and Hour Division within the United States Department of Labor (USDOL). 29 U.S.C. § 204. Section 216(c) empowers the Secretary of Labor to "supervise the payment of the unpaid minimum wages or the unpaid overtime" and to bring actions in federal court to enforce the provisions of the Act. *Id.* § 216(c). And the FLSA also authorizes private lawsuits by employees who have not been paid minimum wage or overtime. *Id.* § 216(b).

In addition, from the outset, the FLSA authorized those private lawsuits to be maintained "by any one or more employees for and in behalf of himself or themselves and other employees similarly situated." *Id.* § 216(b). Thus, long before Federal Rule of Civil Procedure 23 was amended in 1966 to allow for class actions as currently understood, 39 F.R.D. 69, 95-107

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[4] *See* John S. Forsythe, *Legislative History of the Fair Labor Standards Act*, 6 L & CONTEMP. PROBS. 464, 464-72 (1939); Grossman, *supra* note 2.

(1966), the FLSA provided that groups of employees could sue to recover illegally unpaid wages.

The FLSA also allowed the States to maintain their important role as primary regulators of employment-related matters, explicitly providing that the FLSA merely sets the floor for wage-and-hour regulation and that States may impose more stringent laws. *See* 29 U.S.C. § 218(a). As a result, since the passage of the FLSA, States have remained actively involved in wage-and-hour regulation. Forty-one States and the District of Columbia have statutes or regulations that, like the FLSA, require employers to maintain accurate records of the time worked by employees and the wages paid to employees.[5] Approximately 29 States and the District of

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[5] Alaska Stat. § 23.10.100; Ariz. Rev. Stat. Ann. § 23-364(D); Ark. Code Ann. § 11-4-217; Cal. Lab. Code § 1174; CO Wage Order 31, 7 C.C.R. 1103-1:12; Conn. Gen. Stat. § 31-66; Del. Code Ann. tit. 19, § 907; Ga. Code Ann. § 34-4-5; Haw. Rev. Stat. § 387-6; Idaho Code Ann. § 45-610; 820 Ill. Comp. Stat. 105/8; Iowa Code § 91A.6; Kan. Stat. Ann. § 44-1209; Ky. Rev. Stat. Ann. § 337.320; La. Rev. Stat. Ann. 23:1660; Me. Rev. Stat. tit. 26, § 622; Md. Code Ann., Lab. & Empl. § 3-424; Mass. Gen. Laws ch. 151, § 15; Mich. Comp. Laws § 408.479; Minn. Stat. § 177.30; Mo. Rev. Stat. § 290.520; Mont. Admin. R. 24.16.6102; Nev. Rev. Stat. § 608.115; N.H. Rev. Stat. Ann. § 279:27; N.J. Admin. Code § 12:56-4.1; N.M. Stat. Ann. § 50-4-9; N.Y. Lab. Law § 195; N.C. Gen. Stat. § 95-25.15; Ohio Rev. Code Ann. § 4111.14; Okla. Admin. Code 380:30-3-3; Or. Rev. Stat. § 653.045; 34 Pa. Code § 231.31; R.I. Gen. Laws § 28-12-12; S.C. Code Ann. § 41-10-30; Utah Code Ann. § 34-28-10; Vt. Stat. Ann. tit. 21, § 393; 16 Va. Admin. Code 5-32-10; Wash. Rev. Code § 49.46.070; W. Va. Code § 21-5C-5; Wis. Stat. Ann. §

Columbia have established minimum wages higher than the federal minimum.[6] Some States have also enacted overtime laws that are more protective than the FLSA—requiring, for example, payment of time and one-half an employee's normal hourly wage for hours worked in excess of a certain number in a day.[7] Many States have also enacted protective wage laws requiring meal and rest breaks for at least some workers, an issue that the FLSA does not address.[8] And some States have chosen to concentrate their state law protections and resources only or largely on workers who are outside the FLSA's scope,[9] or not to regulate wages and hours at

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104.09; Wyo. Stat. Ann. § 27-4-203; D.C. Code § 32-1008.

[6] For a comprehensive map and listing of state minimum wage requirements, *see* MINIMUM WAGE LAWS IN THE STATES, UNITED STATES DEPARTMENT OF LABOR, *available at* http://www.dol.gov/whd/minwage/america.htm (last updated Jan. 1, 2015) (last visited September 28, 2015).

[7] *See* Alaska Stat. 23.10.060; Cal. Lab. Code § 510; CO Wage Order 30, 7 CCR 1103-1; Nev. Rev. Stat. § 608.018.

[8] *See, e.g.*, Alaska Stat. § 23.10.350; Cal. Lab. Code § 512; 7 CO Wage Order 31, 7 C.C.R. 1103-1; Conn. Gen. Stat. § 31-51ii; Del. Code Ann. tit. 19 § 707; Fla. Stat. § 450.081(4); 820 Ill. Comp. Stat. 140/3; Iowa Code 92.7; Md. Code Ann., Lab. & Empl.§ 3-210; Mass. Gen. Laws Ch. 149, § 100; Mich. Comp. Laws § 409.112; Minn. Stat. §§ 177.253, 177.254; Nev. Rev. Stat. § 608.019; N.Y. Lab. Law § 162; Or. Rev. Stat. § 653.261; Tenn. Code Ann. § 50-2-103 (h).

[9] *See, e.g.*, Kan. Stat. Ann. § 44-1203(c); 40 Okla. Stat. Ann. § 197.4(d); Tex. Lab. Code § 62.151; Va. Code Ann.

all,[10] thus relying exclusively on the FLSA and its enforcement structure to protect workers covered by federal law.

Also like the FLSA, state wage laws generally establish a private-public enforcement scheme. Almost all States have Departments of Labor (or Divisions of Labor Standards) that accept and investigate complaints of unpaid minimum or overtime wages.[11] State Attorneys General also play a critical role in wage-and-hour enforcement by representing the state labor departments in court to defend their findings; some Attorneys General also exercise independent statutory authority to address wage-and-hour violations.[12] In

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§ 40.1-28.9(B)(12); *see also, e.g.*, Ga. Code Ann. § 34-4-3(c) (minimum wage law does not apply to FLSA-covered workers unless state minimum wage exceeds federal minimum wage); Mich. Comp. Laws § 408.420 (same).

[10] *See supra* note 6.

[11] *See* JACOB S. MEYER & ROBERT GREENLEAF, NAT'L ST. ATT'Y GEN. PROGRAM, COLUMB. L. SCH., ENFORCEMENT OF STATE WAGE AND HOUR LAWS, A SURVEY OF STATE REGULATORS 177-94 (April 2011), *available at* http://web.law.columbia.edu/attorneys-general/policy-areas/labor-project/resources/state-and-hour-laws (follow "Full Report" hyperlink) (last visited September 28, 2015).

[12] *Ibid.*; Peter Romer-Friedman, *Eliot Spitzer Meets Mother Jones: How State Attorneys General Can Enforce State Wage and Hour Laws*, 39 COLUM. J.L. & SOC. PROBS. 495, 512-513 (2006).

addition, 40 States and the District of Columbia have laws that provide for a private right of action to obtain unpaid minimum wages and overtime.[13]

Moreover, private wage-and-hour lawsuits brought in federal court, as in this case, often include claims for violations of state law, which may have different remedies or statutes of limitation than the FLSA. *See, e.g., Garcia v. Tyson Foods*, 770 F.3d 1300, 1305 (10th Cir. 2014) (claims brought under the FLSA, which provides at most for double damages, and Kansas Wage Payment Law § 44-314 and 44-315, which provides for

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[13] Alaska Stat. § 23.10.110(a); Ariz. Rev. Stat. Ann. § 23-364; Ark. Code Ann. § 11-4-218; Cal. Lab. Code § 1197.5; Colo. Rev. Stat. § 8-6-118; Conn. Gen. Stat. § 31-68; Del. Code Ann. tit. 19, § 911; Fla. Stat. § 448.110(6)(a); Ga. Code Ann. § 34-4-6; Haw. Rev. § 387-12(b); Idaho Code Ann. § 44-1508; 820 Ill. Comp. Stat. 105/12; Ind. Code Ann. § 22-2-2-9; Kan. Stat. Ann. § 44-1211; Ky. Rev. Stat. Ann. § 337.385; Me. Rev. Stat. tit. 26, § 670; Md. Code Ann., Lab. & Empl. § 3-426(a)(1); Mass. Gen. Laws ch. 151, § 20; Mich. Comp. Laws § 408.419(1)(a); Mo. Rev. Stat. § 290.527; Mont. Code Ann. § 39-3-407; Neb. Rev. Stat. § 48-1231; Nev. Rev. Stat. § 608.260; N.H. Rev. Stat. Ann. § 279:29; N.J. Stat. Ann. § 34:11-56a25; N.M. Stat. Ann. § 50-4-26; N.Y. Lab. Law § 663; N.C. Gen. Stat. § 95-25.22; N.D. Cent. Code § 34-14-09; Ohio Rev. Code Ann. § 4111.14; Okla. Stat. tit. 40, § 197.9; Or. Rev. Stat. § 653.055; 43 Pa. Stat. Ann. § 333.113; R.I. Gen. Laws § 28-12-19; Tex. Labor Code Ann. § 62.203; Utah Code Ann. § 34-40-205; Vt. Stat. Ann. tit. 21, § 395; Va. Code Ann. § 40.1-28.12; Wash. Rev. Code § 49.46.090; W. Va. Code § 21-5C-7; Wyo. Stat. Ann. § 27-4-204(a); D.C. Code § 32-1012; *see also* MEYER & GREENLEAF, *supra* note 11.

damages of 1% of the unpaid wage amount for every day wages are not paid). These state claims are often brought as Rule 23 class actions alongside FLSA collective actions. *See, e.g., ibid.*; *Alvarez v. IBP, Inc.*, 339 F.3d 894, 900 (9th Cir. 2003) (bringing claims under FLSA and Washington meal and rest break law), *aff'd*, 546 U.S. 21 (2005). Thus, the restrictions Petitioner seeks on both class and collective actions would have a significant negative impact on effective private enforcement of state law. Indeed, in the absence of viable private lawsuits enforcing both state and federal law, the only way for large groups of workers to obtain the same relief currently available through these hybrid cases would be a USDOL enforcement action coupled with state-level enforcement, which would—at best—create significant inefficiencies. More likely, workers simply would not obtain all the relief they are entitled to under at least one of the regulatory regimes, if not both. And for workers who are not covered by state law, meaningful private enforcement would be largely unavailable.

In addition, federal law involving the FLSA has long served as persuasive authority in interpreting state wage-and-hour law. Illinois courts, for example, have relied on "the underlying purposes and public policy of the federal and state statutes" to find that "federal cases interpreting the FLSA, while not binding on this court, are persuasive authority and can provide guidance in interpreting issues under the [Illinois] Wage Law and the Wage Payment Act." *Lewis v. Giordano's*

Enters., Inc., 921 N.E. 2d 740, 776 (Ill. App. Ct. 2009). Many state courts have similarly noted that where the substance and remedial intent of a state wage law is consistent with the FLSA, it is appropriate to consider federal cases interpreting the comparable federal statutory provisions. *See, e.g., In re United Parcel Serv. Wage & Hour Cases*, 190 Cal. App. 4th 1001, 1028 (2d Div. 2010) (federal law interpreting similar provisions under FLSA are considered instructive); *Anderson v. State, Dep't of Soc. & Health Servs.*, 63 P.3d 134, 135 (Wash. Ct. App. 2003) (courts may look to federal law regarding the FLSA as persuasive authority on issues of overtime raised pursuant to state Minimum Wage Act); *Quinn v. Alaska State Employees Ass'n. Fed'n of State, Cnty. & Mun. Employees, Local 52*, 944 P.2d 468, 470 n. 3 (Alaska 1997) (when the Alaska Wage and Hour Act does not define a term and additional analysis is required, Alaska courts must look to federal regulations and then to federal case law interpreting the FLSA). Thus, although state courts enforcing state law are generally not bound by federal courts' interpretations of the FLSA, *but see, e.g.*, Mo. Rev. Stat. § 290.505(4) (providing that Missouri overtime provision be interpreted "in accordance with" FLSA); Tex. Lab. Code § 62.051 (providing that covered employers pay minimum wage as established by FLSA), and state and federal wage law standards may differ, as a practical matter, federal case law related to the FLSA has a significant impact on state courts' interpretation and enforcement of their own wage-and-hour laws.

B. Wage Law Enforcement Continues to be Vital Today Because Wage-and-Hour Violations Remain Pervasive.

More than seventy-five years after the passage of the FLSA, the need for strong wage-and-hour enforcement remains critical, as employer noncompliance with such laws is high, particularly for low-wage workers.[14] For example, in a comprehensive survey of 4,387 "front-line workers" in low-wage industries in Chicago, Los Angeles, and New York, a quarter of the workers surveyed reported working more than 40 hours per week, but 76% of those workers also reported that they were not paid the required overtime for those hours. ANNETTE BERNHARDT, ET. AL., BROKEN LAWS, UNPROTECTED WORKERS: VIOLATIONS OF EMPLOYMENT AND LABOR LAWS IN AMERICA'S CITIES 20 (2009).[15] Additionally, 26% of the workers surveyed had

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[14] For additional resources on the prevalence of employer non-compliance with overtime, minimum wage, and other protective wage laws, *see* Matthew W. Finkin, *From Weight Checking to Wage Checking: Arming Workers to Combat Wage Theft*, 90 IND. L.J. 851 (2015); KIM BOBO, WAGE THEFT IN AMERICA (2009); STEVEN GREENHOUSE, THE BIG SQUEEZE (2008); DAVID WEIL, IMPROVING WORKPLACE CONDITIONS THROUGH STRATEGIC ENFORCEMENT (2010); Catherine K. Ruckelshaus, *Labor's Wage War*, 35 FORDHAM URB. L.J. 373 (2008).

[15] The study characterizes a "front-line" worker as someone other than a manager, professional or technical worker. BERNHARDT, ET. AL., BROKEN LAWS, UNPROTECTED WORKERS, at 12.

been paid less than minimum wage during the time period surveyed. *Id.* at 2. In total, the average full-time, front-line worker earning $17,616 per year lost $2,634 or 15% of her yearly income due to legally required but unpaid wages withheld by her employer. *Id.* at 5.

Statistics on wage complaints and recoveries also help quantify the scale of wage-and-hour violations. The United States Department of Labor has received between 22,000 and 32,000 complaints of minimum wage and overtime violations every year for the last five fiscal years.[16] And there are undoubtedly many more violations than actual complaints or lawsuits filed. *See* David Weil and Amanda Pyles, *Why Complain? Complaints, Compliance, and the Problem of Enforcement in the U.S. Workplace*, 27 COMP. LAB. L. & POL'Y J. 59, 77-78 (2005) (estimating that there are 130 employees paid in violation of FLSA overtime provision for every complaint investigated by the USDOL).

Even though many wage-and-hour violations go unreported and uninvestigated, hundreds of millions of dollars are recovered every year on behalf of underpaid workers. In 2012, for example, the USDOL obtained

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[16] U.S. Dep't of Labor, Wage and Hour Division Enforcement Statistics, *available at* http://www.dol.gov/whd/statistics/statstables.htm (last visited September 28, 2015).

$280 million on behalf of such employees.[17] That same year, enforcement agencies in 44 States recovered $172 million and state Attorneys General in 45 States recovered $14 million.[18] Private wage settlements recovered $467 million nationally that same year.[19] Together, these recoveries total over $900 million for just one year, without even factoring in state and federal court *judgments* obtained by employees.

The widespread noncompliance with wage laws evidenced by these numbers not only harms low-wage workers, but also negatively affects States' economies and budgets. When employees lose 15% of the wages that they have earned and are statutorily owed, that is money that they cannot spend or invest in their local community,[20] and governments at all levels lose tax

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[17] *Ibid.*; BRADY MEIXAL AND ROSS EISENBRY, ECONOMIC POLICY INSTITUTE, AN EPIDEMIC OF WAGE THEFT IS COSTING WORKERS HUNDREDS OF MILLIONS OF DOLLARS A YEAR 2, (September 2014), *available at* http://www.epi.org/publication/epidemic-wage-theft-costing-workers-hundreds/ (last visited September 28, 2015).

[18] *Ibid.*

[19] *Ibid.* (citing DENISE MARTIN, STEPHANIE PLANCICH, & JANEEN MCINTOSH, NERA ECONOMIC CONSULTING, TRENDS IN WAGE AND HOUR SETTLEMENTS: 2012 UPDATE (2013)), *available at* http://www.nera.com/content/dam/nera/publications/archive2/PUB_Wage_and_Hour_Settlements_0313.pdf.) (last visited September 28, 2015).

[20] RUTH MILKMAN, ANNA LUZ GONZALEZ, & VICTOR NARRO, INSTITUTE FOR RESEARCH ON LABOR AND EMPLOYMENT,

revenues from that unpaid income and consequent lower spending. At the same time, a recent study demonstrated that between 2009 and 2011, more than half of state and federal spending on certain public assistance programs went to low-wage working families.[21] The Amici States' interest in a comprehensive effective wage law enforcement structure that safeguards employee earnings and, in turn, protects the States' economies and budgets, thus remains as vital today as it was in the early twentieth century.

UNIVERSITY OF CALIFORNIA, LOS ANGELES, WAGE THEFT AND WORKPLACE VIOLATIONS IN LOS ANGELES: THE FAILURE OF EMPLOYMENT AND LABOR LAW FOR LOW-WAGE WORKERS 53 (2010). "[L]ow-wage workers are more likely than any other income group to spend any extra earnings immediately on previously unaffordable basic needs or services." DAVID COOPER AND DOUGLASS HALL, ECONOMIC POLICY INSTITUTE, RAISING THE FEDERAL MINIMUM WAGE TO $10.10 WOULD GIVE WORKING FAMILIES, AND THE OVERALL ECONOMY, A MUCH-NEEDED BOOST, 9 (March 13, 2013), *available at* http://www.epi.org/files/2013/IB354-Minimum-wage.pdf (last visited September 28, 2015).

[21] KEN JACOBS, IAN PERRY, & JENNIFER MACGILLVARY, UC BERKELEY CENTER FOR LABOR RESEARCH AND EDUCATION, THE HIGH PUBLIC COST OF LOW WAGES 2 (April 2015), *available at* http://laborcenter.berkeley.edu/pdf/2015/the-high-public-cost-of-low-wages.pdf (last visited September 28, 2015). In Illinois, for example, from 2009 to 2011, the annual cost to the State of providing Medicaid, the Children's Health Insurance Program, and TANF benefits to working families is $1.098 billion. *Id.* at 8, Table 6. *See ibid.* (listing such statistics for all States).

C. States Depend on Private Attorneys General to Enforce Wage-and-Hour Laws.

Employees who believe that they have been underpaid in violation of the FLSA or comparable state laws generally have the right to file complaints both with the USDOL and with state labor agencies. But these administrative agencies simply do not have sufficient resources to fill the enforcement gap that would be created were private enforcement severely curtailed. Of the more than $900 million recovered for workers in 2012 (not including actual judgments in their favor in private lawsuits), half of that amount was the result of private lawsuits. *See supra* notes 17 and 19. And of the 8,148 FLSA lawsuits filed in 2012,[22] 3,260, or 40%, of the suits were private collective actions.[23] Each of these private collective actions typically represents hundreds, if not thousands, of individual wage claims.[24]

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[22] UNITED STATES GOVERNMENT ACCOUNTABILITY OFFICE, FAIR LABOR STANDARDS ACT: DEPARTMENT OF LABOR NEEDS A MORE SYSTEMATIC APPROACH TO DEVELOPING ITS GUIDANCE, TESTIMONY BEFORE THE SUBCOMMITTEE ON WORKFORCE PROTECTIONS 3 (July 23, 2014), *available at* http://gao.gov/assets/670/664949.pdf (last visited September 28, 2015).

[23] *Id.* at 5, Figure 2.

[24] *See generally* Craig Becker, Paul Strauss, *Representing Low-Wage Workers in the Absence of A Class: The Peculiar Case of Section 16 of the Fair Labor Standards Act and the*

Assuming conservatively that the average FLSA collective action involves 200 covered employees, that would translate to 652,000 individual wage claims. And this calculation does not account for many state law claims that have been aggregated into class actions.

Without a class or collective action to aggregate these claims, these private wage claims would have to be filed through individual private suits or brought by individual complaint by or to a state enforcement agency or the USDOL. Neither the courts nor public labor agencies are in a position to effectively handle this volume of wage claims. And Congress certainly has not intended for the USDOL to do so. *See* J. Maria Glover, *The Structural Role of Private Enforcement Mechanisms in Public Law*, 53 WM. & MARY L. REV. 1137, 1150 (2012) ("Over time, Congress increased incentives for private suit under the FLSA, while simultaneously limiting funding for the [USDOL], which, as a consequence, decreased significantly its own FLSA enforcement efforts.") (internal citations omitted). Likewise, state enforcement efforts have been funded and structured with the knowledge that private lawsuits

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Underenforcement of Minimum Labor Standards, 92 MINN. L. REV. 1317, 1336-37 (2008) (discussing wage and hour class and collective actions involving "hundreds or thousands of opt-in plaintiffs"); Andrew C. Brunsden, Hybrid Class Action, *Dual Certification, and Wage Law Enforcement in the Federal Courts*, 29 BERKELEY J. EMP. & LAB. L. 2, 269, 292-93 (2008) (documenting FLSA collective action plaintiff sizes as high as 2,300).

can be brought. Either together or separately, federal and state agencies cannot come close to fully enforcing wage-and-hour laws and ensuring that workers receive the pay they are entitled to.

The USDOL, for example, has very limited resources. From 1974 to 2004, the number of investigators in the USDOL Wage and Hour Division decreased by around 14%, while the number of covered workplaces grew by 55%.[25] While the Division has hired additional inspectors in recent years,[26] this increased staffing merely brings the agency closer to historic staffing levels. Moreover, the Division cannot realistically take on responsibility for comprehensive enforcement. Not only does it receive more than 22,000

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[25] David Weil and Amanda Pyles, *Why Complain? Complaints, Compliance, and the Problem of Enforcement in the U.S. Workplace*, 27 COMP. LAB. L. & POL'Y J 59, 62 (2005); ANNETTE BERNHARDT & SIOBHÁN MCGRATH, BRENNAN CTR. FOR JUST., ECONOMIC POLICY BRIEF NO. 4, TRENDS IN WAGE AND HOUR ENFORCEMENT BY THE U.S. DEPARTMENT OF LABOR 1975-2004 2 (2005).

[26] *E.g.*, Press Release, Statement by U.S. Secretary of Labor Hilda L. Solis on Wage and Hour Division's Increased Enforcement and Outreach Efforts (Nov. 13, 2009) ("I have hired an additional 250 wage-and-hour investigators."), *available at* http://www.dol.gov/opa/media/press/whd/whd20091452.htm (last visited September 28, 2015).

complaints a year,[27] but the annual probability of a U.S. Department of Labor inspection of one of the seven million workplaces covered by the FLSA is well below 0.1%.[28]

State agencies are similarly underresourced. In a 2011 survey of state wage-and-hour enforcement, many state agencies reported that they receive thousands of complaints of unpaid wages from workers each year.[29] Yet, of the 37 States responding to the survey, only six had more than 30 full time employees devoted to wage-and-hour enforcement, and a majority of states had fewer than 15 full time employees to investigate those thousands of complaints.[30] Furthermore, a majority of the surveyed States had seen budget cuts and reductions in staff in recent years.[31] And while a handful of States reported strong wage law enforcement,[32] others reported not having an agency

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[27] *See* United States Department of Labor Wage and Hour Division statistics, *available at* http://www.dol.gov/whd/statistics/statstables.htm (last visited September 28, 2015).

[28] *See* Weil & Pyles, *supra*, 27 COMP. LAB. L. & POL'Y J. at 77-78.

[29] MEYER & GREENLEAF, *supra* note 11, at 98-106.

[30] *Id.* at 73-80.

[31] *Id.* at 22.

[32] *Id.* at 16.

that "engages in any meaningful enforcement of wage and hour standards" at all.[33] States, like the federal government, thus depend on private actors to supplement governmental efforts to combat wage violations.[34] Without private litigation, wage-and-hour laws will be enforced even more unpredictably than they already are.

D. Class and Collective Actions Are Critical to the Ability of Workers to Bring Private Lawsuits.

Not only are FLSA and state wage laws enforced in large measure through private enforcement schemes, but those schemes specifically provide that wage-and-

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[33] *Ibid.*; *see also* Nantiya Ruan, *What's Left to Remedy Wage Theft? How Arbitration Mandates that Bar Class Actions Impact Low Wage Workers*, 2012 MICH. ST. L. REV. 1103, 1114 (2012) (citing Irene Lurie, *Enforcement of State Minimum Wage and Overtime Laws: Resources, Procedures, and Outcomes*, 15 EMP. RTS. & EMP. POL'Y J. 411, 443 (2011)).

[34] *See* Glover, 53 WM. & MARY L. REV. at 1155 ("It also provides a 'back-up' system of redress, which responds to the problem of limited agency resources "); *see also* Matthew C. Stephenson, *Public Regulation of Private Enforcement: The Case for Expanding the Role of Administrative Agencies*, 91 VA. L. REV. 93, 107-08 (2005) ("By deputizing hundreds or thousands of individual citizens and interest groups to act as private attorneys general, citizen-suit provisions (and other forms of express or implied private rights of action) can dramatically increase the social resources devoted to law enforcement, thus complementing government enforcement efforts.").

hour claims can be resolved collectively. Indeed, wage claims are particularly well suited to collective resolution because they often concern a single common employment policy or the common legal question of whether the activity performed was "work." Llezlie Green Coleman, *Procedural Hurdles and Thwarted Efficiency: Immigration Relief in Wage and Hour Collective Actions*, 16 HARV. LATINO L. REV. 1, 9 (2013).

These common questions, in turn, require common answers for which collective resolution is appropriate, indeed, preferable. *See Wal-Mart Stores, Inc. v. Dukes*, __U.S.__, 131 S. Ct. 2541, 2551 (2011) (noting that a key question for class certification purposes is the capacity to generate common answers). A ruling limiting the ability of employees to recover their unpaid wages through private class or collective actions would undermine the national wage-and-hour enforcement scheme by either burdening state agencies and the USDOL (as well as the courts) with duplicative individual cases that would overwhelm existing public resources or by leaving employees with no means to recover unpaid wages.

This Court has recognized that collective actions provide "plaintiffs the advantage of lower individual costs to vindicate rights by the pooling of resources" and "[t]he judicial system benefits by efficient resolution in one proceeding of common issues of law and fact arising from the same alleged discriminatory activity." *Hoffmann-La Roche Inc. v. Sperling*, 493 U.S. 165, 170

(1989). The reality is that for most employees (particularly low-wage employees) a collective or class action is not just preferable to an individual lawsuit, it is their only realistic means of bringing a private wage claim.[35]

There are many reasons why low-wage workers may be unable to bring individual private actions to recover unpaid wages. Such employees are likely to face retaliation. *See* BERNHARDT, ET AL., BROKEN LAWS, UNPROTECTED WORKERS, at 3 (finding that 43% of employees surveyed who complained about workplace violations experienced retaliation by their employers in the form of termination, suspension, threats, or reductions in hours or pay). Low-wage workers often cannot afford to take the necessary unpaid time off of work to locate and then meet with lawyers or attend depositions and hearings. *See* Ruan, 2012 MICH. ST. L. REV. at 1119. In contrast, in a class or collective action, the burdens of prosecuting an action are shared and the

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[35] *See, e.g.*, Finkin, *supra*, 90 IND. L.J. at 855 ("[E]nforcement of wage claims by individual legal action, [are] a chimera for the vast majority of low-wage workers absent effective class actions . . . ."); Nantiya Ruan, *Facilitating Wage Theft: How Courts Use Procedural Rules to Undermine Substantive Rights of Low-Wage Workers*, 63 VAND. L. REV. 727, 738 (2010) ("Although a potential outcome of closing the collective action avenue would be more individual lawsuits, such a result would be unlikely to occur The result is fewer lawsuits and more wage violations going unpunished.").

risk of retaliation smaller because of the number of employees involved.

Perhaps the most significant obstacle to bringing a private wage claim, however, is the high cost of litigation, which makes individual legal representation impractical and largely unavailable. A study commissioned by the Washington State Supreme Court's Task Force on Civil Equal Justice Funding, found, for example, that only half of low-wage workers seeking legal help with an employment problem were able to find an attorney to represent them.[36] For most low-wage employees, the amount of wages they are owed, while no doubt significant to them, is not enough to justify the attorney's fees that must be incurred to bring even an individual suit. *See* Nantiya Ruan & Nancy Reichman, *Hours Equity Is the New Pay Equity*, 59 VILL. L. REV. 35, 36 (2014) ("Courts, including the Supreme Court, recognize the importance of aggregate litigation as the only means of relief where a plaintiff's claim is too small economically to support individual litigation and 'private attorney generals' are needed to diffuse the costs and risks among the class."). Thus, for most employees, aggregating their wage

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[36] *See* Task Force on Civil Equal Justice Funding, The Washington State Civil Legal Needs Study, (Olympia, WA: Washington State Supreme Court, 2003), *available at* http://www.wsba.org/atj (follow "Key Documents" hyperlink; then follow "Washington State Civil Legal Needs Study" hyperlink) (last visited September 28, 2015).

claims is the only way to obtain private enforcement of their rights.

II. PETITIONER'S REJECTION OF *MT. CLEMENS* WOULD HAVE PROFOUND NEGATIVE EFFECTS ON BOTH PRIVATE AND PUBLIC ENFORCEMENT OF WAGE-AND-HOUR LAWS AND WOULD PROVIDE INCENTIVES TO EMPLOYERS NOT TO MAINTAIN REQUIRED RECORDS NECESSARY TO ENFORCE MANY LAWS.

When an employer fails to keep statutorily required records and employees' claims raise common legal questions, *Mt. Clemens* holds that representative evidence is permissible to establish the amounts due workers, subject to rebuttal by the employer. 328 U.S. at 687-88. Petitioner's position, however, would make class and collective actions unavailable in cases where such representative evidence is necessary on the grounds that the lack of individualized records defeats predominance. But, as already explained, class and collective actions are critical to effective enforcement of wage-and-hour laws. Thus, by precluding them in cases where employers do not keep accurate records, Petitioner's view would allow employers to rely on one statutory violation—the failure to keep adequate records—to largely insulate themselves from liability on another—the failure to pay statutorily-required wages. Petitioner's approach would undermine the ability of private litigants to recover unpaid wages on behalf of employees, and if accepted by this Court, it could have

implications for direct enforcement actions brought by state agencies on behalf of groups of workers as well as the use of representative proof in a variety of other contexts. Finally, by creating an incentive for employers not to maintain statutorily-required records, it would undermine enforcement of both wage-and-hour regulation and a variety of other laws.

A. The *Mt. Clemens* Framework Is Widely Used and Prevents an Employer from Benefitting from a Failure to Maintain Required Records.

In *Mt. Clemens*, the Court was faced with facts very similar to those presented in this case. There, employees of a large pottery plant sought to recover pay for the time they spent walking to their workplaces and putting on their protective clothing and equipment. 328 U.S. at 682-686. The defendant employer did not track or record the actual amount of time employees spent engaging in these activities. *Id.* at 686.

Mt. Clemens recognized that "it is the employer who has the duty . . to keep proper records of wages, hours and other conditions and practices of employment and who is in [a] position to know and to produce the most probative facts concerning the nature and amount of work performed." *Ibid.* Therefore, when an employer fails to fulfill its statutory duty to keep records "the solution is not to penalize the employees by denying recovery based on an inability to prove the extent of undercompensated work," thereby frustrating the

intent of the statute, "but rather to allow the employee or the Secretary to submit sufficient evidence from which violations of the Act and the amount of an award may be reasonably inferred." *Martin v. Selker Bros., Inc.* 949 F.2d 1286, 1297 (3rd Cir. 1991) (citing *Mt. Clemens,* 328 U.S. at 687). The employer then has the opportunity to rebut this inference, either with evidence of the precise amount of work performed or with "evidence to negative the reasonableness of the inference to be drawn." *Mt. Clemens*, 328 U.S. at 687-88.

The *Mt. Clemens* framework has been used for decades in FLSA cases. *See, e.g., McLaughlin v. Ho Fat Seto*, 850 F.2d 586, 589 (9th Cir. 1988); *Hodgson v. Elm Hill Meats of Ky., Inc.*, 463 F.2d 1186, 1187 (6th Cir. 1972); *Wirtz v. McClure*, 333 F.2d 45, 47 (10th Cir. 1964); *Foremost Dairies, Inc. v. Ivey,* 204 F.2d 186, 188 (5th Cir. 1953); *Porter v. Poindexter*, 158 F.2d 759, 761-62 (10th Cir. 1947). Under this approach, courts have recognized that the testimony of some employees can establish FLSA claims and damages for non-testifying employees by inference. *Morgan v. Family Dollar Stores*, 551 F.3d 1233, 1279 (11th Cir. 2008); *Reich v. S. New England Telecomm. Corp.*, 121 F.3d 58, 67–68 (2d Cir. 1997); *U.S. Dep't of Labor v. Cole Enters., Inc.*, 62 F.3d 775, 781 (6th Cir. 1995); *Reich v. Gateway Press, Inc.*, 13 F.3d 685, 701 (3d Cir.1994); *Martin v. Tony & Susan Alamo Found.*, 952 F.2d 1050, 1052 (8th Cir.1992); *Martin*, 949 F.2d at 1298; *Sec'y of Labor v. DeSisto*, 929 F.2d 789, 792 (1st Cir. 1991); *McLaughlin*,

850 F.2d at 589. Similarly, courts have found that use of expert testimony and time studies, sometimes in combination with the testimony of some individual workers, can establish time worked from which wage-and-hour violations may be inferred. *See, e.g., Perez v. Mountaire Farms*, 610 F. Supp. 2d 499, 522-523 (D. Md. 2009), *aff'd in relevant part*, 650 F.3d 350, 362 (4th Cir. 2011); *Metzler v. IBP, Inc.*, 127 F. 3d 959, 965-966 (10th Cir. 1997).

Despite its lengthy pedigree, Petitioner would undermine this doctrine by precluding its use in class and collective actions and indeed, by precluding class or collective action certification altogether in cases in which representative evidence is the only way to establish liability or damages. But as already explained, without aggregating claims, employees may well be unable to recover illegally withheld pay. Moreover, because employers who do not keep the required records would be likely to be able to underpay their employees with impunity, while the employer who does keep records would have to compensate its employees, employers would have an incentive to "violate their statutory record-keeping dut[ies]," *Hart v. RCI Hospitality Holdings, Inc.*, No. 09 CIV. 3043 PAE, 2015 WL 1061501, *12 (S.D.N.Y. Mar. 11, 2015). Such a result is both inequitable and illogical. In such a situation, "the employer, having received the benefits of [the employees'] work, cannot object to the payment for the work on the most accurate basis possible under the circumstances." *Mt. Clemens*, 328 U.S. at 688.

In addition, the *Mt. Clemens* approach has been adopted by many state courts, which generally follow the federal courts' interpretation and application of the FLSA when construing state law. Thus, although state courts can choose not to follow federal precedent in this context, Petitioner's view could disrupt state enforcement as well. Courts in at least 15 States have used the *Mt. Clemens* representative evidence framework. *See, e.g., Barios v. Brooks Range Supply, Inc.*, 26 P.3d 1082, 1086 (Alaska 2001); *Hernandez v. Mendoza*, 245 Cal. Rptr. 36, 39-40 (Cal. Ct. App. 2d Dist. 1988); *Schoonmaker v. Larence Brunoli, Inc.*, 828 A.2d 64, 83 (Conn. 2003); *Johnson & Jenkins Funeral Home, Inc. v. District of Columbia*, 318 A.2d 596, 596 (D.C. 1974); *People ex rel. Illinois Dep't of Labor v. 2000 W. Madison Liquor Corp.*, 917 N.E.2d 551, 556-57 (Ill. App. 2009); *Stanbrough v. Vitek Solutions, Inc.*, 445 S.W.3d 90, 100-01 (Miss. Ct. App. 2014); *Arlington v. Miller's Trucking, Inc.*, 343 P.3d 1222, 1228-29 (Mont. 2015); *New Jersey Dept. of Labor v. Pepsi-Cola*, No. A-918-00T5, 2002 WL 187400, *86-87 (N.J. Super. Ct. App. Div. Jan. 31, 2002) (unreported); *State of New Mexico ex. rel. State Labor Comm'r v. Goodwill Indus.*, 478 P.2d 543, 545 (N.M. 1970); *Mid Hudson Pam Corp. v. Hartnett*, 549 N.Y.S.2d 835, 837 (N.Y. App. Div. 1989); *Cooper v. Creative Homes of Distinction, LLC*, No. COA01-1138, 568 S.E. 2d 337, at *2-3 (N.C. Ct. App. Sept. 3, 2002) (unpublished disposition); *Handford v. Buy Rite Office Prods., Inc.*, 3 N.E.3d 1245, 1250-51 (Ohio Ct. App. 2013); *Braun v. Wal-Mart Stores, Inc.*,

106 A.3d 656, 666-67 (Pa. 2014); *Pugh v. Evergreen Hosp. Med. Ctr.*, 312 P.3d 665, 668 (Wash. Ct. App. 2013). Without *Mt. Clemens*, these cases would be difficult or impossible to bring.

Moreover, state labor enforcement agencies themselves often use representative proof to establish liability and damages on behalf of groups of employees for whom individualized evidence of hours worked is unavailable due to the employer's inadequate records. For example, in *Mid Hudson Pam Corp.*, 549 N.Y.S.2d at 837, the state agency relied on representative proof to establish the extent of a violation of state prevailing wage law involving a large group of employees. Specifically, the wage investigator "formulated a methodology to determine how much compensation was due these workers and how much they were underpaid" because the employer did not keep required records. *Id.* at 836; *see also ibid.* ("The remedial nature of the enforcement of the prevailing wage statute and its public purpose of protecting workmen entitled the Commissioner to make just and reasonable inferences in awarding damages to employees even while the results may be approximate.") (internal citations omitted); *New Jersey Dept. of Labor*, 2002 WL 187400, *85 (upholding use of representative proof by New Jersey Department of Labor and relying on USDOL's use of such evidence in enforcing FLSA).

Not only could Petitioner's argument disrupt the enforcement of state laws as a practical matter, but

Petitioner's half-hearted suggestion that using the *Mt. Clemens* framework in a class or collective action violates due process, Pet. Br. at 37, if accepted, would directly threaten the viability of these state private and direct enforcement actions. This suggestion of a due process challenge is meritless and indeed, Petitioner cites no authority to support it. The existence of uncertainty and the need to make inferences are standard features of our legal system. As explained *infra*, courts rely on representative evidence and inference to establish liability and damages in all kinds of different cases, particularly where the wrongdoer is responsible for the lack of more precise evidence. Acceptance of Petitioner's argument would thus have implications far beyond wage-and-hour laws.

B. Use of Representative or Inferential Proof Is Not Unique to the Wage-and-Hour Context.

There is nothing particularly remarkable about the use of representative evidence. Just as it allows employees to present evidence from which a "reasonable inference," *Mt. Clemens*, 328 U.S. at 68, can be drawn, so too are such inferences drawn in many areas of law, including areas in which Amici States have significant enforcement responsibility. Moreover, courts in these other areas of law have ensured that a defendant's failure to maintain records itself not preclude recovery. For example, in the antitrust arena this Court has recognized that

> [w]here the tort itself is of such a nature as to preclude the ascertainment of the amount of damages with certainty, it would be a perversion of fundamental principles of justice to deny all relief to the injured person, and thereby relieve the wrongdoer from making any amend for his acts. In such case, while the damages may not be determined by mere speculation or guess, it will be enough if the evidence show the extent of the damages as a matter of just and reasonable inference, although the result be only approximate. The wrongdoer is not entitled to complain that they cannot be measured with the exactness and precision that would be possible if the case, which he alone is responsible for making, were otherwise.

Story Parchment Co. v. Paterson Parchment Co., 282 U.S. 555, 563 (1931).

Indeed, courts have long permitted the approximation of aggregate antitrust damages proven as a matter of just and reasonable inference because it "embodies the principle that a too-demanding damages standard would act as an 'inducement to make wrongdoing so effective and complete in every case as to preclude any recovery, by rendering the measure of damages uncertain.'" *In re Polyurethane Foam Antitrust Litig.*, No. 1:10 MD 2196, 2014 WL 6461355, at *44

(N.D.Ohio Nov. 17, 2014) (quoting *Bigelow v. RKO Radio Pictures*, 327 U.S. 251, 264 (1946)).

This understanding can be found in areas of law as disparate as the Employment Retirement Income Security Act (ERISA) and patent law. For example, where an employer was delinquent in making its contributions to a pension fund but did not keep sufficient records to establish what those contributions should have been, courts in ERISA cases have shifted the burden to the employer to dispute the fund's calculations of damages, although those calculations depend on the time worked by each employee. *See, e.g., Brick Masons Pension Trust v. Indus. Fence & Supply*, 839 F.2d 1333, 1338-39 (9th Cir. 1988); *Combs v. King*, 764 F.2d 818, 826-27 (11th Cir. 1985).

Likewise, patent law recognizes the doctrine of "confusion of goods" to ensure that patentees "are not [] penalized by the infringer's failure to keep records necessary to compute damages." 7 DONALD S. CHISUM, CHISUM ON PATENTS, § 20.03[3][c][i], pp. 20-246 to 20-247 (2003). And as in *Mt. Clemens*, the burden of proof as to damages shifts. In *Sheldon v. Metro-Goldwyn Pictures Corp.*, 309 U.S. 390, 405-06 (1940), this Court held that "(w)here there is a commingling of gains, [the infringer] must abide the consequences, unless he can make a separation of the profits so as to assure to the injured party all that justly belongs to him." *See also Sensonics, Inc. v. Aerosonic Corp.*, 81 F.3d 1566, 1572 (Fed. Cir. 1996) ("When the calculation of damages is

impeded by incomplete records of the infringer, adverse inferences are appropriately drawn."); *Stryker Corp. v. Intermedics Orthopedics, Inc.*, 891 F. Supp. 751, 818 (E.D.N.Y. 1995) ("the risk of uncertainty in calculating damages is borne by the wrongdoer instead of the injured party"), *aff'd*, 96 F.3d 1409 (Fed. Cir. 1996).

Furthermore, in cases of all kinds, damages can be uncertain and inferences are necessary. *See, e.g., Boucher v. U.S. Suzuki Motor Corp.*, 73 F.3d 18, 23 (2d Cir. 1996) (using work-life expectancy projections to determine damages in products liability action); *G.M. Brod & Co., Inc. v. U.S. Home Corp.*, 759 F.2d 1526, 1538-40 (11th Cir.1985) (using expert projections to prove rental company's lost profits by examining the profits of other comparable business operations); *Exxon Corp. v. Texas Motor Exchange, Inc.*, 628 F.2d 500 (5th Cir.1980) (relying on survey evidence of likelihood of confusion, as opposed to evidence of actual confusion, to establish liability in trademark infringement suit). In light of this widespread use of inferential and representative evidence in the face of uncertainty, there is no reason to carve out wage-and-hour law for an insurmountable and inequitable insistence on absolute precision, particularly where the defendant itself is responsible for the impossibility of achieving it.

C. Incentives for Employers Not to Maintain Proper Records Would Undermine Enforcement of Many State and Federal Laws.

Under both federal and state wage-and-hour laws, employers are required to keep accurate records of their employees' work time. *See supra* at 7, 8. Such recordkeeping is essential to the enforcement of those laws, whether by private lawsuits or by state or federal agencies. *Mt. Clemens* provides a strong incentive for employers to comply with these recordkeeping requirements, and weakening it would undermine enforcement efforts.

Moreover, employers' failure to keep accurate records of the hours their employees work would have negative effects on state and federal law enforcement and program administration well beyond wage-and-hour laws. For example, States rely on employers' records of hours worked and wages paid to determine if employees are eligible for unemployment insurance and, if so, to calculate the benefits that they are entitled to receive.[37] An employee's eligibility for workers' compensation and

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[37] *See, e.g.*, Alaska Stat. § 23.20.350 (eligibility for benefits depends on threshold wage earnings during specific time period); Fla. Stat. § 443.111 (same); Mich. Comp. Laws § 421.27 (same). *See also Veverka v. New York State Dept. of Labor*, 404 N.Y.S.2d 276, 277 (N.Y. Sup. Ct. 1978) ("It is by the maintenance and inspection of such records that the public policy of providing unemployment insurance benefits is effective.")

the amount of benefits received similarly hinge on employment records,[38] and eligibility for federal- and state-mandated family-and-medical leave depends on the accurate documenting of hours worked during the year prior to the start of leave.[39] And under ERISA, an employer must keep records of its employees' hours to permit the calculation of benefits. *See* 29 U.S.C. § 1059(a)(1). The more employers fail to keep accurate records of the time their employees work, the more difficult it will be to enforce these laws and administer these programs.

State and federal taxing authorities also rely heavily on employer recordkeeping to determine the amount of income and payroll taxes owed. Yet due in large part to off-the-books work and misclassification of employees as

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[38] Wash. Rev. Code. § 51.08.178 (compensation is based on employee monthly wages and hours worked); 77 Pa. Cons. Stat. § 582 (same); 820 Ill. Comp. Stat. 305/10 (same); N.C. Gen. Stat. § 97-29 (same); La. Rev. Stat. Ann. 23:1600 (same).

[39] *See* 29 C.F.R. § 825.110(c) (federal Family and Medical Leave Act rules provide for burden shifting when employer has not maintained adequate employee records). *See, e.g.*, Conn. Gen. Stat. § 31-51kk (eligibility for benefits under state family and medical leave law depends on hours worked prior to first day of leave); R.I. Gen. Laws Ann. § 28-48-2 (same); Tex. Gov't Code Ann. § 661.912 (family and medical leave for state employees); Miss. Code. Ann. § 25-3-93 (same). *See also Cantrell v. Delta Airlines, Inc.*, 2 F. Supp. 2d 1460, 1462 (N.D. Ga. 1998) ("If an employer does not maintain an accurate record of hours worked by an employee, the employer has the burden of showing that the employee has not worked the requisite hours.").

independent contractors, there is already a growing gap between employment taxes owed and those voluntarily and punctually paid. The federal Internal Revenue Service estimates that the tax gap attributable to underreporting of employment taxes alone is around $54 billion.[40] Similarly, a study commissioned by the USDOL found in 2000 that the Unemployment Insurance Trust Fund loses an average of $198 million annually due to underreporting of employees for Unemployment Insurance tax purposes.[41] These tax gaps can only be expected to increase—and state and federal taxing authorities' ability to successfully audit payroll tax evasion to concurrently decrease—if employers have incentives not to keep accurate records of hours worked and wages paid. *Mt. Clemens* thus supports a larger legal structure, and threats to its continued vitality threaten more than wage-and-hour laws.

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[40] *See* REPORT OF THE TREASURY INSPECTOR GENERAL FOR TAX ADMINISTRATION, WHILE ACTIONS HAVE BEEN TAKEN TO ADDRESS WORKER MISCLASSIFICATION, AN AGENCY-WIDE EMPLOYMENT TAX PROGRAM AND BETTER DATA ARE NEEDED 8 (February 2009); *available at* https://www.treasury.gov/tigta/auditreports/2009reports/200930035fr.html (last visited September 28, 2015).

[41] PLANMATICS, INC., INDEPENDENT CONTRACTORS: PREVALENCE AND IMPLICATIONS FOR UNEMPLOYMENT INSURANCE PROGRAMS 69 (February 2000), *available at* http://wdr.doleta.gov/owsdrr/00-5/00-5.pdf (last visited September 28, 2015).

Because employer non-compliance with wage laws remains pervasive, the transaction costs of litigation high, and funding to government agencies limited, private class and collective actions brought on behalf of similarly situated employees remain a critically important vehicle for wage-and-hour enforcement nationally. This Court should not adopt new restrictions on class or collective actions that would undermine this longstanding public-private enforcement scheme and that would encourage employers to fail to keep records that are used to enforce numerous other laws.

CONCLUSION

For the foregoing reasons, the judgment of the Court of Appeals should be affirmed.

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